NO. 15612

In the United States Court of Appeals

For the Ninth Circuit

CRESCENT WHARF & WAREHOUSE COMPANY, a corporation, and PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District, and WILLIAM LASCHE,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

BRIEF FOR APPELLANTS CRESCENT WHARF & WAREHOUSE COMPANY & PACIFIC EMPLOYERS INSURANCE COMPANY

HIGGS, FLETCHER & MACK
By JOHN W. BURNETT, JR.
2250 Third and Juniper Streets
San Diego 1, California.
Attorneys for Appellants.

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JURISDICTIONAL STATEMENT

This case arose upon a complaint for judicial review of a compensation order filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, Title 33, U. S. C. A., Sec. 901 et seq.

Jurisdiction of the District Court for the Southern District of California, Southern Division was obtained by the provisions

of Section 921 (b) of said Act, Title 33 U. S. C. A., which provides:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred . . ."

This appeal from the final judgment of dismissal of the within action by the District Court below is taken pursuant to the provisions of Section 1291, Title 28, U. S. C. A., which provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . ."

STATEMENT OF THE CASE

This is an appeal from the United States District Court for the Southern District of California, Southern Division, Honorable Jacob Weinberger, District Judge, wherein judgment was entered on April 19, 1957, denying plaintiffs' (appellants herein) motion for substitution of party defendant nunc pro tunc; granting defendants' (appellees herein) motion to dismiss the suit, and the order that the suit be dismissed.

The complaint was filed November 16, 1954 for the purpose of judicially reviewing certain compensation orders made by Deputy Labor Commissioner Warren H. Pillsbury of the 13th Compensation District, Bureau of Employees' Compensation, United States Department of Labor. Said order reaffirmed a prior compensation order made by Deputy Labor Commissioner Albert J. Cyr on May 17, 1951. This later order, and the industrial incident from which it arose, was the subject matter of prior liti-

gation and appellate review before this Court. See *Cyr* v. *Crescent Wharf & Warehouse Co.* (9th Cir., 1954), 211 F. 2d 454. The matter therein had been remanded to the deputy commissioner for further findings. The within complaint sought to obtain judicial review of the further findings and the compensation order that followed. In accordance with the express provisions of Section 921 (b) of said Act, plaintiffs applied for and obtained from the Court below a preliminary injunction against Deputy Commissioner Warren H. Pillsbury and William Lasche, the employee involved, from enforcing the provisions of the aforesaid compensation order except the weekly disability payments to defendant Lasche in the amount of $35.00 per week, pending judicial review of the within action.

On March 28, 1955, the matter came on for hearing before the Honorable Peirson M. Hall, District Judge. Judge Hall, after hearing argument of counsel and taking the matter under submission, issued an order remanding the case to the deputy commissioner for certain specific findings. This order was dated June 27, 1955. Thereafter, on August 2, 1955, pursuant to proper motion, Judge Hall ordered his order of June 27, 1955 vacated and the case resubmitted for decision. No decision was ever rendered by Judge Hall on the merits of plaintiffs' complaint for judicial review.

On February 25, 1957, defendant Pillsbury filed a motion to dismiss the complaint on the grounds that the action had abated against Pillsbury inasmuch as he had retired from public office on December 31, 1955 and was succeeded to office by Charles F. Hanson on February 9, 1956 and no order for substitution had been made within six months of when the successor Hanson had taken office.

Neither plaintiffs nor their attorneys had actual notice of the fact of Pillsbury's retirement or the appointment of his successor

to office until they were served with defendants' motion to dismiss on February 26, 1957. During the interim of the date of submission on August 2, 1955 and the date of defendant's motion to dismiss on February 26, 1957—a period of approximately one year and seven months—numerous inquiries had been made to the clerk of the court to ascertain the status of the matter and always the reply was that the matter was still under submission and a decision would be rendered in due time.

By stipulation of counsel, defendant's motion to dismiss was continued for hearing until March 18, 1957 and on March 14, 1957, plaintiffs filed a motion for substitution nunc pro tunc to August 4, 1956—a date within six months of when deputy commissioner Hanson had taken public office.

Both motions for dismissal and substitution were heard before the Honorable Jacob Weinberger, District Judge. Hearing and argument took place on March 18, 29, 1957, and the matters were taken under submission. On April 19, 1957, Judge Weinberger entered judgment denying plaintiffs' motion to substitute the successor deputy commissioner nunc pro tunc to six months of when he took office; the motion of defendant to dismiss the aciton was granted and judgment was so entered.

This appeal followed by plaintiffs from entry of final judgment.

SPECIFICATION OF ERRORS

I. The trial court was in error in entering a dismissal because by Legislative decree of Congress, the proceedings herein are within the exclusive jurisdiction of Admiralty; rendering Rule 25(d) inapplicable.

II. The trial court was in error in entering judgment of dismissal in that Rule 25(d) has the effect of a statute of limitations and as such constituted an improper invasion by the Supreme Court into the substitive rights of appellants.

III. The trial court was in error in applying Rule 25(d) to the proceedings herein in that Congress intended that the Longshoremen's & Harbor Workers' Compensation Act was a National compensation law and exempt from the rules of civil procedure.

IV. The trial court was in error in entering judgment of dismissal in that a party defendant remained after the public officer Pillsbury was dismissed from the suit and the action should therefore not have been dismissed in its entirety.

V. The trial court was in error in applying Rule 25(d) to the within proceedings in that the rule fails to specify any notice of fact of succession of public officers to party litigants and as such violates the "due process" clause of the U. S. Constitution.

VI. The delay of decision on the merits by the trial judge below violated the due process clause of the U. S. Constitution.

SUMMARY OF ARGUMENT

Congress, in enacting the Longshoremen's and Harbor Workers' Compensation Act, provided that the Act was Maritime in nature. Federal decisions have interpreted the Act to be within the jurisdiction of the Admiralty side of the District Court. The Federal rules of civil procedure would therefore be inapplicable to proceedings for judicial review or enforcement of compensation orders under the Act.

The proper action for this court to follow in the present appeal is to vacate the judgment of dismissal entered by the court below; remand the case to the court below with directions that the suit be treated as a libel on the Admiralty side of the court and the court there to take the appropriate action under Admiralty rules and to dispose of the motions for substitution of appellants and motion for dismissal of appellees in conformance with said rules.

If the Federal rules of civil procedure do apply to the within proceedings, Rule 25 thereof has the effect of a statute of limitations and as such, constitutes an improper invasion by the Supreme Court into the substantive rights of appellants.

Inasmuch as the Longshoremen's Act is patterned after the New York Compensation Act, it seems evident that Congress intended that the Longshoremen's Act was meant to be a National compensation law and as such was exempt from the Federal rules of civil procedure.

The trial judge below erred in entering a judgment of dismissal of appellant's cause of action in that another necessary defendant, William Lasche, beneficiary of the compensation order herein, was still a proper party defendant. Defendant LASCHE did not join public officer Pillsbury in the motion to dismiss for want of timely substitution. The reason for abatement is that there is no proper party defendant to respond to judgment. There was such a defendant remaining herein after appellee Pillsbury's motion to dismiss had been granted.

Rule 25 is unconstitutional as violative of the "due process" clause of the Fifth Amendment of the U. S. Constitution in that no provision exists for notice to party litigant of when the 6 months period for substitution begins to run. Appellants are entitled to actual notice of such event in order that they shall have opportunity to present every available defense. Actual notice is intrinsic within the "due process" clause.

The holding under submission without a decision for a period of approximately one year and seven months by a trial judge below, decries from the traditional notion of fair play, equity and substantial justice, which principles are also implicit within the due process clause of the Fifth Amendment.

I

BY LEGISLATIVE DECREE, THE PROCEEDINGS HEREIN ARE WITHIN THE EXCLUSIVE JURISDICTION OF ADMIRALTY; RENDERING RULE 25(d) INAPPLICABLE.

Rule 81(a)(6) of the Federal Rules of Civil Procedure states that said rules ". . . apply to proceedings for enforcement or review thereof of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act . . . except to the extent that matters of procedure are provided for in that Act." It was on the basis of this Rule that the within action was labeled a "complaint" and the action filed on the law side of the District Court. Now, after extensive research into the matter, it is submitted that notwithstanding the provisions of Rule 81, proceedings to review compensation orders issued under the provisions of the Longshoremen's and Harbor Workers' Compensation Act fall within the exclusive admiralty and maritime jurisdiction of the District Court.

By the provisions of Section 2072, Title 28, U. S. C. A., Congress has delegated to the United States Supreme Court, power to promulgate rules for district courts. Section 2072 provides:

> "The Supreme Court shall have the power to prescribe, by general rules . . . the practice and procedure of the district courts of the United States . . . in civil actions.
>
> "Such rules shall not abridge, enlarge or modify any substantive right . . ."

By the similar provisions of Sections 2073, Title 28, U. S. C. A., Congress also delegated to the Supreme Court power to promulgate practice and procedure in admiralty and maritime cases. Congress thus recognizes complete separation of judicial

power between cases in law and cases in admiralty. Admiralty jurisdiction is separate and apart from jurisdiction at law, and has its own rules, methods and procedure. *Swanson v. Marra Brothers,* 328 U. S. 1.

One of the very first sections of the Longshoremen's and Harbor Workers' Compensation Act, Section 903, provides that the Act is maritime in nature and compensation is payable "only if the disability or death results from injury occurring upon the navigable waters of the United States . . ."

In the leading case of *Crowell v. Benson* 285 U. S. 22, Chief Justice Hughes wrote an opinion construing the Act to be within the admiralty and maritime jurisdiction of our federal system. In that case suit was brought to review and enjoin an award made by a deputy commissioner of the United States Employees' Compensation Commission—the same form of action as instigated in the case at bar. A motion to dismiss the action was denied by the District Court and the case was transferred to the admiralty docket. At 285 U. S. p. 39 Justice Hughes wrote:

> "As the Act relates solely to injuries occurring upon the navigable waters of the United States, it deals with the maritime law applicable to matters that fall within its admiralty and maritime jurisdiction. (U. S. Constitution, Article III, sec. 2; *Nogueira v. New York,* N. H. & H. R. Co. 281 U. S. 128, 138); and the general authority of Congress to alter or revise the maritime law which shall prevail throughout the country is beyond dispute." (citing cases)

Farther on in Chief Justice Hughes' opinion, he comments on the apparent novelty of the Act providing for injunctive proceedings under Section 921 (b) of the Act and at the same time having the rules of admiralty apply. At page 39 he states:

> "The Congress was at liberty to draw upon another system of procedure to equip the court with suitable and adequate

means of enforcing the standards of the maritime law as defined by the Act (citing cases). By statutes and rules courts of admiralty may be empowered to grant injunctions, as in the case of limitation of liability proceedings (citing cases)."

There is also the further provision of Rule 81(a)(1) which unequivocally states that the Federal Rules of Civil Procedure ". . . do not apply to proceedings in admiralty." Thus, whether the rules of admiralty or of civil procedure apply to the within action becomes vital to appellants' survival of their cause of action where more than six months have expired since Pillsbury's successor took public office. Appellants know of no rule in admiralty which requires substitution of parties within six months of when they succeeded to public office, as is true at law and equity under Rule 25(d) of the Federal Rules of Civil Procedure. It has been held that admiralty is not bound by the strict rules of the common law, and not infrequently applies principles differing from those in other courts. *Atlantic Fruit Co. v. Red Cross Line* (D. C. N. Y. 1921) 276 Fed. 319, affirmed 5 F.2d 218; *The Wanata v. Avery,* 95 U. S. 600, 611. Thus, the common law rule that an action abates, in the absence of statute, upon the expiration of a public officer defendant's term of office and such action cannot be revived against his successor, would not apply in admiralty by operation of law. As far as appellant's research indicates, the point has not been treated in appellate decisions of our federal system.

The entire situation reaches this possible absurd result: If plaintiffs herein had ignored Rule 81(a)(6) and filed their action on the admiralty side of the District Court below, defendants' motion to dismiss for want of timely substitution would not have prevailed unless laches or some similar doctrine of law had been urged by defendants. Appellants cannot believe that our federal system can or will tolerate such gross inconsistent and inequitable

application of the Longshoremen's and Harbor Workers' Compensation Act.

Are appellants estopped from now urging that the matter herein is one of admiralty rather than law? Appellants think not. A very similar situation arose in a case before this Court in *Kobilkin v. Pillsbury* (9th Cir., 1939), 103 F.2d 667 in which the action was remanded to the District Court below with instructions that the action be treated as a libel. In that case an employee filed a claim under the provisions of the Longshoremen's and Harbor Workers' Compensation Act and upon denial of his claim by Deputy Commissioner Pillsbury, the same commissioner as here, the employee brought suit in the District Court by a petition in equity to set aside the order of the deputy commissioner, invoking what is now Section 921(b) of the Act. From a decree of the district court granting a motion to dismiss, the employee appealed to this Court.

Judge Healy wrote the opinion and at 103 F.2d, p. 670 stated:

> "Appellant (the employee) should have filed his petition as a libel on the admiralty side of the district court. See *Twin Harbor Stevedoring & Tug Co. et al v. Marshall et al.,* 9 Cir., 103 F.2d 513, this day dictated. The cause is remanded to that court with instructions to treat the petition as a libel, the motion to dismiss as an exception to its sufficiency (Admiraly Rule Sup. Ct. 27, 28 U. S. C. A. following section 723), and to enter a decree of dismissal. The decree is vacated with instructions to transfer to admiralty docket and decree a dismissal."

Judge Matheurs in a concurring opinion stated at pages 670-671:

> "The suit was brought in the right court, but on the wrong side of the court. It was brought in equity. It should have been brought in admiralty. The Longshoremen's and Harbor Worker's Compensation Act is part of the maritime law

of the United States. The jurisdiction conferred by section 21 (b) is admiralty jurisdiction. (citing cases, including *Crowell vs. Benson,* supra).

"That the court may, in a suit under section 21 (b), issue an injunction, mandatory or otherwise, does not make the court an equity court or the suit an equity suit. Injunction may be issued in admiralty as well as equity. (citing *Crowell vs. Benson,* supra) By providing for injunction proceedings, Congress contemplated a suit *as* in equity (Id, 285 U. S. p. 63, 52 S. St. p. 297, 76 L. Ed. 598), but it did not contemplate a suit *in* equity. It did contemplate a suit in admiralty."

It is interesting to note that the *Kobilkin* decision was dated April 14, 1939. The new rule 81(a)(6) of the Rules of Federal Civil Procedure was ordered by the Supreme Court on December 28, 1939, but notwithstanding, it affirmed the holding of the *Kobilkin* case per curiam by an equally divided court on January 29, 1940. *Kobilkin vs. Pillsbury* (9 Cir. 1939), 103 F.2d 667, affirmed, 1940, 309 U. S. 619, 60 S. Ct. 465, 84 L. Ed. 983.

An excellent summation and attempt to resolve the foregoing apparent inconsistencies was set forth by this Court in *Rupert v. Todd Shipyards Corporation* (9th Cir., 1956) 236 F.2d 559, where this Court upheld the action of a district court judge in transferring, on his own initiative, a case to the admiralty side of the docket. The suit there was also one to review and enjoin enforcement of a compensation order of a deputy commissioner under the Longshoremen's and Harbor Worker's Compensation Act. The suit had been brought on the law side of the district court, as was done in the case at bar. Chief Judge Denman wrote the opinion of the Court and at 236 F.2d p. 560 stated:

"In *Crowell v. Benson,* 285 U. S. 22, 27, 49, 52 S. Ct. 285, 76 L. Ed. 598, the Supreme Court held that the District Court sitting in admiralty had jurisdiction of claims under the Act and could exercise the power of injunction where

required. In 1921, in *Carlisle Packing Co. v. Sandanger,* 259 U. S. 255, 259, 42 S. Ct. 475, 66 L. Ed. 927 a jury-tried common law suit brought by a seaman for damages from unseaworthiness of the vessel, the Supreme Court recognized the long established doctrine that common law suits on such rights in admiralty are within the jurisdiction of the District Court. That is to say, the District Courts could consider the claimed right either in admiralty or at common law.

"We do not agree with appellees' contention that in 1939 the district courts were deprived of their admiralty jurisdiction of claim under the Act and confined to mere common law suits on such claim by a rule of the Supreme Court making the Rules of Civil Procedure, 28 U. S. C. A., applicable to cases under the Act. Originally by some oversight the Civil Rules did not apply to civil suits under the Act but in that year they were made to apply by an amendment of the rules (Rule 81(a)(6), 28 U. S. C. A.)"

"Obviously such an amendment of the rules was necessary for common law actions, but it seems to us unreasonable to contend that the mere implementation of common law suits constituted an overruling of the law established in *Crowell v. Benson,* supra, that the Act created a right enforceable in admiralty.

"Shipyards cites nothing of the views of the committee drafting the amending rules supporting its contention and we can find nothing. Nor can we agree with Moores' unsupported footnoted dictum (Moores' Fed. Pract., Vol. 5, p. 289, footnote 4) that such a claim should be considered only on the civil side of the court."

As matters now stand, the Longshoremen's Act, by its own statutory provisions and as interpreted by the foregoing cases, created rights enforceable in admiralty. Rule 81(a)(6) states however that the Federal Rules of Civil Procedure apply as to enforcement or review of compensation orders under the Act. It could be argued that inasmuch as Rule 81(a)(6) is the most recent action by the Supreme Court, that the provisions of the

Rule should prevail over prior case law, the statutory language itself, or subsequent inferior case law. Appellants challenge the power of the Supreme Court to go that far in promulgating rules for district courts. Under the provisions of Section 2072, Title 28, U. S. C. A., such an extension of power by the Supreme Court would be a direct "abridgment, enlargement or modification" of the substantive law of the Act. As said in the *Rupert* case, supra, under the authority of *Crowell v. Benson,* the Act created "a right enforceable in admiralty." Appellants find no delegation of authority from Congress to the Supreme Court wherein the Court is given the express power to "abridge, enlarge, or modify" such rights as are created under the provisions of the Act. The function of rules of court is to regulate the practice of the court and facilitate the transaction of its business. It is submitted that a rule of court cannot enlarge or restrict jurisdiction, or abrogate or modify substantive law. Such a limitation applies to the rules prescribed by the Supreme Court for inferior tribunals, whether at law or in admiralty. *Washington-Southern Nav. Co. v. Baltimore, etc., Steamboat Co.,* 263 U. S. 629.

It is submitted that the better explanation of why Rule 81(a)(6) was adopted by the Supreme Court is set forth in the *Rupert* case decided by this Court. This Court stated in that opinion that "obviously such an amendment of the rules was necessary for common law actions." The Court then cited the *Carlisle* case, supra, as an example of a common law action wherein suit was brought by a seaman for damages from unseaworthiness of a vessel. Therein, it is submitted, lies the fundamental distinction between a common law action, as in the *Carlisle* case and the review action of the case at bar. The action herein was filed solely and exclusively pursuant to the statutory authority to do so conferred by Section 921(b) of the Act. No common law action to do so exists. As such, the action should

have been filed on the admiralty docket of the district court and not the law side. It would therefore be proper to follow the action of this Court in the *Kobilkin* case, supra, and remand the within action to the Distrcit Court below with instructions to treat the matter as one in admiralty and follow the appropriate Rules of Admiralty in disposing of the motions which were before that Court.

II

RULE 25(d) HAS THE EFFECT OF A STATUTE OF LIMITATIONS AND AS SUCH, CONSTITUTES AN IMPROPER INVASION BY THE SUPREME COURT INTO THE SUBSTANTIVE RIGHTS OF APPELLANTS.

If it be the conclusion of this court that the within action is one not properly transferrable to the admiralty docket of the District Court, and that the Federal Rules of Civil Procedure, and in particular Rule 25(d), do apply—then appellants must at once attempt a successful distinguishment of *Snyder v. Buck,* 340 U. S. 15. This case held by a 5-4 decision that a suit by a naval widow against the paymaster general of the Navy abated on appeal where the paymaster defendant retired from public office and his successor was not made a party defendant within six months after taking office, as required by Section 11(a) of the Judiciary Act of 1925, 43 Stat. 936, 941.

Snyder v. Buck was decided November 13, 1950. Since that date, the holding of the case and its dictum have been the Waterloo of many an action wherein timely substitution of a public officer was not made. Undoubtedly counsel for Appellees will have such cases collected and will present them with macabre delight.

In *Snyder v. Buck* plaintiff, a naval widow, brought an action of mandamus to compel the sole defendant Buck, as Paymaster General of the United States, to pay death benefits due plaintiff under the provisions of Section 943, 34 U. S. C. A. Jurisdiction was alleged under the Tucker Act, 24 Stat. 505, as amended. The Tucker Act specifically confers original jurisdiction on district courts in any civil action or claim against the United States founded upon the U. S. Constitution or Act of Congress. Section 1346(a)(2), 28 U. S. C. A.

On January 30, 1948 judgment for the petitioner was entered by the District Court wherein the defendant was ordered to pay the death benefits due. On March 18, 1948 defendant Buck filed a notice of appeal. He had however, retired from the Navy and a successor was appointed to his public office as paymaster general. Neither party made any motion within six months to have the successor in office substituted on appeal. The issue of abatement was raised in oral argument before the Court of Appeals. The case was thereafter remanded to the District Court with directions to dismiss the complaint as abated. The Supreme Court held that in the absence of a necessary party the matter abated and the action of the Court of Appeals was proper.

There are several vital differences between the *Snyder* case and the case at bar. First of all, the Supreme Court construed and applied Section 11(a) of the Judiciary Act of 1925 and *not* Rule 25(d) of the Federal Rules of Civil Procedure. The reason for this is stated in footnote 2 of the Court's opinion, 340 U. S. at p. 17:

> "(Section 11(a) of the Judiciary Act) was repealed as of September 1, 1948, 62 Stat. 992, 1000. It is argued that, since that date was the date on which the 6 months statutory period for substitution in this case expired and since the repealing Act preserved any rights or liabilities existing under any of the repealed laws (id., 992), Section 11 gov-

erns this case. We need not reach the effect of the repealing Act. For the Court of Appeals during the period material to our problem had in force its Rule 28(b) which provided that abatement and substitution were governed by Section 11 of the 1925 Act."

While Section 11(a) of the Judiciary Act of 1925 and Rule 25(d) of the Federal Rules of Civil Procedure are nearly identical and have the same 6 month provision for substitution of a successor to public office, there is a very basic distinction between the two. Section 11(a) was promulgated as a statute by Act of Congress. 43 Stat. 936, 941. Rule 25(d), on the other hand, was promulgated by the United States Supreme Court. While the Rules may have the effect of a statute, there is a fundamental difference between an *Act* of Congress and an *order* of the Supreme Court. It is submitted, that Rule 25(d) as interpreted and applied by the Court below becomes in effect, a statute of limitations. Such a limitation, it is submitted, must be enacted by the legislature and is beyond the competence of the court to enact. *Perry v. Allen* (5th Cir., 1956) 239 F.2d 107. In the *Perry* case plaintiff taxpayer brought suit against Collector of Internal Revenue for recovery of taxes erroneously assessed and paid. The United States intervened. The District Court dismissed the action because the administrator for the deceased collector had not been substituted within the 2 year requirement of Rule 25(a) of the Federal Rules of Civil Procedure. The Court of Appeals reversed, holding that in the absence of a federal statute of limitations governing substitution within a specified time after the death of a party, a federal rule requiring such substitution within two years after death of the party could not operate as a statute of limitation. Such a limitation, as stated above, may be enacted solely by the legislature and not a court.

As stated in Moores Federal Practice, Vol. IV, p. 516:

". . . insofar as Rule 25 prescribes an absolute time period within which substitution must be made, as it does in subdivisions (a), (b), and (d), it operates in the nature of a statute of limitations, and would, therefore, seem to be invalid as an improper invasion of the field of substantive rights."

If Rule 25 does have the effect of a statute of limitations the Rule again conflicts with Section 2072, 28 U. S. C. A., wherein Congress expressly provided that the Rules "shall neither abridge, enlarge nor modify the substantive rights of any litigants." Congress by enacting this section clearly recognized the distinction between substantive law, creating rights and duties of litigants, and procedural or adjective law, prescribing the court practice, and means or method of administering substantive law. *Occidental Life Ins. Co. of Cal. v. Kielhorn* (D. C. Mich. 1951), 98 F. Supp. 288.

The effect of the judgment of dismissal by the Court below was to terminate any possibility of survival of the within statutory action for judicial review of a compensation order under the provisions of Section 921(b) of the Longshoremen's Act because of the supposed mandatory provisions for timely substitution under Rule 25(d). As the Rule was thus interpreted and applied, it became a substantive and not procedural question. The question of survival with respect to a cause of action created by an act of Congress is not procedural but is one which depends upon the substance of the cause of action. *Barnes Coal Corp. v. Retail Coal Merchants' Ass'n.* (4th Cir., 1942), 128 F.2d 645. See also, *Electropure Sales Corp. v. Anglim* (D. C. N. Y. 1937), 21 F. Supp. 451.

III

CONGRESS INTENDED THAT THE LONGSHOREMEN'S & HARBOR WORKERS' COMPENSATION ACT, AS A NATIONAL COMPENSATION LAW, SHOULD BE EXEMPT FROM THE RULES OF CIVIL PROCEDURE.

If Rule 25(d) does not apply to the within action because its six month period within which to substitute operates as a statute of limitation and is therefore substantive, an inspection must then be made of the Longshoremen's etc., Act for the specific provisions of survival. In *Snyder v. Buck,* 340 U. S. 15 at p. 21, the Court recognizes the principle that when a specific statute provides in some manner for a perpetuation of action by or against an incumbent or his privities in public office, an action does not abate upon the expiration of a party defendant's term of office.

The Longshoremen's Act is national in scope and provides for a Federal compensation system. *Parker v. Motor Boat Sales,* 314 U. S. 244. Section 939(a) of the Act places the responsibility of administering the Act upon the Secretary of Labor. The Secretary of Labor promulgates rules and regulations, establishes the compensation districts, appoints deputy commissioners, etc.

By Section 940(e) of the Act, 33 U. S. C. A., when a deputy commissioner ceases to act in his official capacity, all his official records and papers are transferred to his successor. That section states:

> "If any deputy commissioner is removed from office, or for any reason ceases to act as such deputy commissioner, all his official records and papers and office equipment shall be transferred to his successor in office or, if there be no successor, then to the Secretary (of Labor) or to a deputy commissioner designated by the Secretary."

Section 919(g) of the Act allows deputy commissioners to inter-transfer claims between themselves. That section reads:

> "At any time after a claim has been filed with him, the deputy commissioner may, with the approval of the Secretary, transfer such case to any other deputy commissioner for the purpose of making investigation, taking testimony, making physical examinations or *taking such other necessary action therein as may be directed.*" (emphasis added)

By the provisions of Section 31.24, 20 Code Fed. Regs., the Secretary of Labor has given his unequivocal approval of transfer of cases between deputy commissioners. That section provides:

> "At any time after a claim has been filed with him, the deputy commissioner may, with the approval of the Bureau, transfer such case to any other deputy commissioner for the purpose of making investigation, taking testimony, making physical examinations *or taking such other necessary action therein as may be directed.*" (emphasis added)

The obvious interpretation appellants wish to place upon the foregoing sections is that they constitute a sufficient statutory decree from Congress that compensation claims and cases arising under the Act are perpetuated and automatically transferred from a deputy commissioner to his successor, and that a case on review before the district court becomes the successor's responsibility, without the necessity of formal substitution. As stated in *Ozawa v. United States,* 260 U. S. 178, 194:

> "It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the *purpose* may not fail."

Appellants submit also that the Longshoremen's Act was not contemplated by Congress to be within the purview of Rule 25(d) of the Federal Rules because it was enacted as a national compensation act patterned after the New York Workmen's Compensation Act. *Case v. Pillsbury* (9th Cir., 1945), 148 F.2d 392. Just as the New York and California Compensation Acts provide that the Act constitutes the exclusive remedy of the employee against the employer for industrial injuries—so does the Longshoremen's Act. See e.g., Section 905 of the Act, 33 U. S. C. A.:

> "The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee, . . ."

Just as New York and California have provisions in their State Compensation Acts liberalizing procedure and rules of evidence —so does the Longshoremen's Act. See e.g., Section 923(a) of the Act, 33 U. S. C. A.:

> "In making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties . . ."

Appellants see no distinction in the argument they are now advancing (that the Longshoremen's Act is not within the purview of Rule 25(d) and the reasoning of the Court in *Acheson v. Fujiko Furusho* (9th Cir., 1954), 212 F.2d 284 where it was held that actions by persons claiming to have been denied rights as nationals of the United States, did not abate under Rule 25(d) for the reason, inter alia, that Section 903 of Title 8 U. S. C. A. (Nationality Act) did not apply to such Rules. In that case,

several separate actions were consolidated for purposes of decision. In one of the actions, *Ng Kwock Gee v. Acheson,* the District Court had adjudged that the plaintiff was not a national of the United States and the plaintiff filed notice of appeal while the Secretary of State, Dean Acheson, was in office. Subsequently, John Foster Dulles succeeded to the office of Secretary of State. Plaintiff did not make a motion for substitution within the required six months under Rule 25(d). A motion to dismiss the appeal was made by United States Attorney on the ground that the action had abated because of no timely substitution. The motion to dismiss on the ground that the matter had abated was denied and the motion to substitute granted even though more than six months had passed since the successor took office. In that decision this Court thoroughly sets forth the chronology of the forerunner of Rule 25(d) and the case law on the subject of abatement as to public officials. In holding that Section 903 of Title 8 U. S. C. A. does not come within the purview of Rule 25(d) the decision states at 212 F.2d at p. 292:

> "We think the above review of cases after as well as before the Congressional enactments, show clearly that judges and legislators, in passing upon the subject of abatement of cases wherein government officers were parties were acting upon the impropriety and futility of going ahead where the judgment would not be effective. In no case is there any hint of or expressed reason for extending the abatement doctrine to actions wherein the judgment merely adjudicates the nationality status of the plaintiff which, by the way, is as binding to the world as it is to the defendant officer who cannot be under any judicial command in relation to the operation of the judgment. While the adjudication of the plaintiff as a national of the United States, under Section 903 of Title 8 U. S. C. A. would result in the cessation of the deprivation of the right or privilege which entitled the plaintiff to sue, it does not order and cannot constitute an order to the defendant as in mandamus, habeas corpus, or injunction."

With respect to the preliminary injunction obtained against Pillsbury in the case at bar, appellants submit that it is in reality an injunction against any deputy labor commissioner from attempting to enforce the compensation orders or award that issued from the Bureau of Employees' Compensation, Department of Labor. The Bureau of Employees Compensation is, in effect, sui juris. There is privity between officers of the same department of government. *Sunshine Coal Company v. Adkins,* 310 U. S. 381. Undoubtedly the file herein was kept on active status by deputy commissioner Hanson after the retirement of Pillsbury. Perpetuation of all claims and cases from a retiring commissioner to a successor is provided for in both the Act and rules and regulations. As was stated in the *Acheson* case, 212 F.2d at pp. 287-288:

> "It is not claimed by or for the former Secretary of State or the former Attorney General that any harm has come or will come to the government of the United States or any department thereof by reason of the delay in petitioning for the substitution of the successor of the resigned officials. And the record in each case shows conclusively that these cases have continued to be live in the Department of Justice and in the Department of State, and that they were current items of business in those departments though the changes in the heads thereof. There is no inequitable consideration involved which would result in injustice if the cases are held to survive."

Appellants can present no better argument than the foregoing quotation for reasons why the case at bar should be excluded from the provisions of Rule 25(d) which has been aptly described as "easily the poorest rule of all the Federal Rules." 41 Amer. Bar J. 43. Appellants concur.

IV

INASMUCH AS A PARTY DEFENDANT REMAINED AFTER PUBLIC OFFICER PILLSBURY WAS DISMISSED FROM SUIT, THE ACTION SHOULD NOT HAVE ABATED.

Appellants submit that the Court below should not have entered a judgment of dismissal of the entire action. The chief authority relied upon by the trial judge for granting appellee's motion to dismiss for want of timely substitution of a public officer was *Snyder v. Buck,* supra. The case, as previously noted, involved a situation where the public official, the paymaster general of the United States Navy, was the *only* defendant. In the case at bar, however, not only was Deputy Commissioner Pillsbury named as a party defendant, but also the employee and claimant, William Lasche, in whose favor the compensation orders had been made.

Defendant, William Lasche, was joined as a party defendant in the within action because under the Longshoremen's & Harbor Workers' Compensation Act he had rights of enforcement of a compensation order that had to be enjoined pending the outcome of the within action for judicial review. Defendant William Lasche joined the defendant Warren H. Pillsbury in filing their answer to the within action (Transcript of Record, p. 21).

Under Section 921(c), 33 U. S. C. A. of the Act defendant Lasche, as a beneficiary of a compensation award, could "apply for the enforcement of the order to the Federal District Court . . ." In Section 918(a) of the Act, the employee is empowered to take positive action following a compensation order and can apply for supplemental orders of enforcement if needed. By the provisions of Rule 19(b) of the Federal Rules of Procedure,

defendant Lasche could have been made a party defendant to the within action by order of the District Court if plaintiffs had so moved at a later time.

Therefore, even if appellees' motion to dismiss as to Pillsbury was properly taken and a dismissal properly entered as to the public official, the cause of action on file herein should have survived because of the remaining party defendant. It should also be noted that the motion to dismiss that appellee filed, was solely in behalf of defendant Pillsbury. Defendant Lasche did not join in such action. (Transcript of Record, p. 33)

The within action was one of judicial review of certain compensation orders. A preliminary injunction had been obtained against all defendants from attempting to enforce that order and award, pending judicial review. A hearing had been had on the merits and the matter had stood under submission for over a year and seven months when the motion to dismiss for failure to timely substitute the successor public official had not been made. For all practical purposes, the action was over; pending only a decision—which never came. Under such circumstances, it is submitted, the action should have survived until a decision was handed down. A proper party defendant remained even if the public official was dismissed from the suit.

The case of *Acheson v. Fujiko Furusho* (9th Cir., 1954), 212 F.2d 284, at p. 288 also discusses when abatement and dismissal should lie:

> ". . . it is of some importance to keep in mind that abatement of a case usually follows, as of course, when there is no one to respond to a judgment which might be or has been entered in a case. When a case reaches that posture the futility of its continuing is evident, and it abates. No statute upon the subject is needed to authorize a court or judge to make an order to the effect that the case is no longer alive."

In the instant case defendant Lasche had statutory rights available to him against the appellants. The judgment which would have been entered on the merits would certainly have involved Lasche—he was the beneficiary of the compensation award. It wasn't futile to allow the action to continue to a decision, even though appellee's motion to dismiss as against the public official had been granted.

V

LACK OF NOTICE OF SUCCESSION TO PUBLIC OFFICE IN RULE 25(d) VIOLATES THE "DUE PROCESS" CLAUSE OF THE CONSTITUTION, THEREBY RENDERING THE RULE INAPPLICABLE TO THE WITHIN SUIT.

Whatever may be the propriety of Rule 25(d) and its six month period in which to make substitution of a successor to public office, the rule has serious constitutional shortcomings. The most obvious shortcoming, in the opinion of appellants, is the Rule's bland circumvention of the "Due Process" clause of the Fifth Amendment, U. S. Constitution, U. S. C. A. Amend. 5., wherein no provision for notice is made for placing parties on notice as to when a public officer has been removed from office and his successor appointed and the six month period began to run.

The Rule provides that before "a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object." No where in the Rule, however, is there a similar provision that the successor, or retiring officer, shall give notice to other parties, of the fact of change

of incumbency. The "traditional notion of fair play and substantial justice" would decree such notice be given to adverse parties, or at the very least, notice "reasonably calculated to give . . . actual notice of the proceeding and an opportunity to be heard." *Milliken v. Meyer,* 311 U. S. 457, 463.

A party who has appeared in a legal proceeding should be entitled to *actual* notice, rather than constructive notice, or notice by publication. In re *Glenn-Colusa Irr. Dist.* (D. C. Cal. 1945) 62 F. Supp. 651. In the Glenn case petition for voluntary bankruptcy had been filed under the Bankruptcy Act, 11 U. S. C. A. Sec. 401-404. An interlocutory decree had been entered confirming a plan of composition. No notice of said interlocutory decree was ever received by a claimant or his attorneys who had filed proper proof of claim approximately 4 months before entry of decree. A motion by the claimant was filed to share pro rata in the composition, even though the turning in of certain bonds had not been done within the time fixed by the terms of the Interlocutory Decree. The affidavit supporting the motion revealed that the first notice of the entry of decree obtained by claimant's attorney was when he had a telephone conversation with the clerk of the court some 11 months after the decree was entered. The court held that the motion should be granted, as the bankruptcy court has equitable powers and "equity does not favor anything which amounts to a forfeiture." 62 F. Supp. at p. 652. The court further states:

> "Furthermore, a party who has appeared in a legal proceeding should be entitled to actual notice, rather than constructive notice, or notice by publication."

None of the cases appellants have researched under Rule 25(d) have ever discussed the particular point raised herein (that there is a lack of due process for want of notice). A basic re-

quirement of the Constitution is the guarantee that appropriate notice of judicial action shall be given to the parties affected. As was said in *Simon v. Kraft,* 182 U. S. 427, 436, "The essential elements of due process of law are notice and opportunity to defend." This means that the parties shall have an opportunity to present *every* available defense. *State of Kansas, ex rel. Beck v. Occidental Life Insurance Co.* (C. C. A. Kansas 1938), 95 F.2d 935, Cert. denied, 59 S. Court 63, 305 U. S. 603.

In paragraph XI of plaintiff's complaint herein (Transcript of Record p. 14), appellants have alleged that the order of compensation and award issued by the Deputy Commissioners violated the Fifth Amendment to the Constitution wherein plaintiffs would suffer irreparable damage by being deprived of their property without due process of law and without reasonable or adequate means or remedy for the recovery thereof. There has been no determination as to the merits of that allegation. The deprivation of a citizen of his property without notice and opportunity to be heard amounts o the taking of his property without due process of law. *Clarksbury-Columbus Short Route Bridge Co. v. Woodring,* 89 F.2d 788, 790.

Appellants therefore contend that lack of notice of the fact of Pillsbury's retirement or the taking of office by his successor, Hanson, has resulted in the taking of appellant's property without opportunity to be heard and as such, violates the Fifth Amendment to the U. S. Constitution.

VI

DELAY OF DECISION BY TRIAL JUDGE VIOLATED DUE PROCESS CLAUSE OF CONSTITUTION.

As was set forth in the Statement of the Case, supra., a hearing on the merits of Appellant's complaint was had on March 28, 1955, before the Honorable Pierson M. Hall, District Judge. After taking the matter under submission, Judge Hall, on June 27, 1955, issued an order remanding the case to the Deputy Commissioner for specific findings. Later, pursuant to stipulation of all counsel and proper motion, on August 2, 1955, Judge Hall vacated his order of remand of June 27, 1955, and the case was resubmitted for decision. No decision was ever served on appellants.

It was shortly after February 25, 1957, that appellant's received the unhappy motion of appellee to dismiss for want of timely substitution of Pillsbury's successor. This motion was approximately 1 year and 7 months after the matter had been submitted for a decision.

Appellants have scoured the Federal Rules exhaustively but to no avail for a provision similar to Sections 632, 664 of the California Code of Civil Procedure, which Sections provide that a trial judge must file his written findings and decision and judgment within 30 days of submission.

Section 632 of the California Civil Code of Procedure provides in part:

> "In Superior Courts and Municipal Courts, upon the trial of a question of fact by the court, it's decision must be given in writing and filed with the clerk within 30 days after the cause is submitted for a decision."

Section 664 of the California Civil Code of Procedure pro-

vides in part:

> "If the trial, in a Superior or Municipal Court, has been had by the court, judgment must be entered by the clerk, in conformity to the decision of the court, immediately upon the filing of such decision; in Justice Courts, judgment must be entered within 30 days after the submission of the cause."

Apparently there is no similar provision of the above California sections in the Federal Judicial System. There should be. A rule similar to the above in the Federal Judicial System would have averted the headaches and needless burning of midnight oil that both counsel for appellants and appellees have expended herein. Appellants submit that a delay of one year and seven months after a matter is submitted for a decision is a far cry from traditional notions of fair play, equity and substantial justice. Equitable principles "do not favor anything which amounts to a forfeiture." In re *Glenn-Colusa Irr. Dist.* (D. C. Cal. 1945), 62 F. Supp. 651. Fair play and substantial justice are implicit in due process, *Milliken v. Meyer,* 311 U. S. 457. That appellants have been damaged by such delay in rendering a decision is obvious; perhaps inextricably so.

Appellants submit that such a lengthy delay before rendering a decision by the trial judge herein, an albeit, forgotten facts upon which to now render a just decision, also violates the due process clause of the Fifth Amendment, U. S. Constitution.

CONCLUSION

From the foregoing points and arguments, appellants respectfully submit that the action of the court below in entering a judgment of dismissal of appellants' cause of action was error. As firstly argued, after extensive research and studying of the provisions of the Longshoremen's & Harbor Workers' Compensa-

tion Act and the case law construing it, it is the opinion of counsel for appellants that jurisdiction of the District Court to review compensation orders of a Deputy Commissioner lies within the exclusive Admiralty jurisdiction of the court. If this be so, the court below was in error in applying Rule 25(d) to the within action. The rules of Admiralty and civil procedure are not interchangeable unless expressly so providing. Appellants are unaware of any Admiralty rule similar to Rule 25(d) requiring mandatory substitution of a public officer's successor within six months. In Admiralty therefore, the court below would have had some discretion in treating appellee's motion for dismissal. Nor are appellants estopped at this stage of the proceedings to insist that the within action is properly one of Admiralty and not law. The contention presents a jurisdictional question which is vital at any stage of the proceedings.

If the within matter is in fact one to which Rule 25(d) does apply, then at least two central questions are resolved. Firstly, as the Rule was applied by the court below, it became one of substantive law, having the effect of a statute of limitations. It is within the exclusive power of the Legislature and not the Supreme Court to promulgate substantive law. Therefore, the rule should not, albeit, cannot apply herein. Without the Rule and its mandatory 6 month period within which to substitute, the court below would have had some discretion in treating the various motions of the parties. Secondly, there is no provision in the Rule for notice to party litigants as to when the six month period begins to run. Due process requires such notice to party litigants.

Inasmuch as the Longshoremen's Act was patterned after the New York Compensation Act, and excludes application of ordinary rules of evidence or civil procedure, it seems evident that Congress intended the Act to be excluded from coverage of the Federal rules of civil procedure, which rules in fact were enacted

subsequent to the Act. Rule 25 would again simply not apply to the within action.

Finally, appellants urge the entire situation herein called for the trial court to exercise its equitable powers. The delay of approximately one year and seven months on the part of one of the trial judges in rendering a decision has proven to be a costly delay to appellants. This entire matter would not now be before this court had a decision been rendered within a reasonable time after submission. Such delay, appellants submit, is also deprivation of due process.

Appellants therefore respectfully submit that this proceeding should be remanded to the trial court below with instructions:

1. To vacate and set aside the judgment of the dismissal.

2. To order the matter placed on the Admiralty docket and treated as a libel and to treat appellee's motion to dismiss as an exception to its sufficiencies.

3. To deny appellee's motion as to the sufficiency of the libel.

4. To treat appellant's motion for substitution nunc pro tunc as a petition to substitute new party and to grant same.

HIGGS, FLETCHER & MACK

By John W. Burnett, Jr.
Attorneys for Appellants